OSK & Partners Sdn Bhd & Anor v Assets Investment Pte Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–35 OF 2005
GOPAL SRI RAM, RAUS SHARIF AND ZAINUN ALI JJCA
15 NOVEMBER 2007

Contract — Breach — Implied term — No formal agreement — Implied from correspondence between parties — Whether it could be implied that appellant for a management fee would procure and manage asset swap transaction — Whether appellant fulfilled its obligation in contract — Whether appellant was financial adviser to respondent

Evidence — Witness — Credibility of — Trial judge's findings based on witness whose testimony was unreliable — Whether trial judge had treated evidence with utmost caution and suspicion — Whether trial judge erred in placing weight upon such evidence — Whether finding constituted a misdirection warranting appellate intervention

Tort — Negligence — Duty of care — Whether appellant owed respondents a duty of care — Whether appellant liable for negligent misstatement

Konsortium Enterprise (M) Sdn Bhd ('Konsortium'), a company associated with Assets Investment Pte Ltd ('the respondent'), applied to the appellant for a loan of RM10m in the form of a margin facility against the security of its shares in Metroplex Bhd, a company listed on the Kuala Lumpur stock exchange. Although the appellant was not able to offer the margin facility, it devised an alternative means of obtaining finance ie an asset swap transaction. This transaction was to be done through a loan broker in Hong Kong known as Qwinzy Corporate Services Ltd ('Qwinzy'). The asset swap transaction involved the sale of Metroplex shares to lenders/buyers introduced by Qwinzy with an option to Konsortium to repurchase the shares within a stated period. Qwinzy was therefore an asset swap broker for third party principals whose identities were not known by the appellant, in the beginning stages. To keep alive the repurchase option against buyers/lenders, option instalments fees were payable monthly by Konsortium commencing from the date of full release of the funds. The appellant charged a management fee of 1% of the net value of the asset swap for acting as 'introducer' and getting the parties

A together (Konsortium and Qwinzy). Once the parties were all in agreement, Konsortium proceeded to apply for the asset swap facility by firstly applying to Bank Negara Malaysia ('BNM') for approval. When Konsortium's application for permission was rejected then, the respondent, an offshore company operating in Kuala Lumpur, was used to replace Konsortium and
B get around BNM's disapproval. BNM duly approved the respondent's application in its proposal to enter into an asset swap transaction with Qwinzy. Until this point when the respondent replaced Konsortium in the transaction with Qwinzy, the appellant was not aware of the existence of the
C respondent. However, the relationship between the appellant, Qwinzy and the respondent did not last. It changed especially when Qwinzy introduced its third party principals to participate in the asset swap transaction. United Islamic Investments Foundation ('UIIF') was one such principal to be introduced to the respondent. Thereafter, the respondent entered into a sale
D and purchase agreement, in relation to the asset swap transaction, directly with UIIF. Under the sale and purchase agreement, the appellant agreed to sell 23 million Metroplex shares valued at RM0.73 per share and subject to an option granted in favour of the respondent to repurchase the shares upon the terms and conditions set out therein. The respondent, in order to keep
E the option to repurchase the shares valid was obliged to pay UIIF a monthly option installment of HK326,663.88 each month. The respondent paid its monthly option instalments but the fifth cheque to be paid by the respondent to UIIF ran into some technical difficulty, in that the name UIIF was wrongly spelt by the respondent, which led UIIF to reject the said cheque. UIIF
F declared a breach by the respondent which it alleged allowed it to terminate the agreement. The respondent proceeded to commence an action against UIIF and Qwinzy and several other parties in Hong Kong. It later commenced the present action against the appellant for breach of an implied term in the contract to carry out a reasonable duty of care, and failure by the
G appellant to discharge its duty of care in tort reasonably, resulting in negligence. It was the respondent's case that as the result of the negligent misrepresentations given by the appellant to the respondent, the latter had suffered substantial losses calculated to the sum of RM81,988,482.11.

The trial judge held that the appellant owed a duty of care to the respondent
H both in contract and tort and the defendant had breached its duty but gave judgment for the sum of RM26,984,728.75 together with interest and costs. According to the trial judge although there was no express written agreement of a contractual relationship between the parties, such a relationship could be implied from the 'correspondence' between the parties. The 'correspondence'
I referred to by the trial judge was in effect a letter from the appellant informing the respondent that it had finalised the asset swap with Qwinzy and that it would be charging 1% on the net value of the asset swap as its management fee. Thus, the trial judge had concluded that the appellant had procured and managed an asset swap transaction with a third party for a

management fee. This was the appellant's appeal against that decision. The appellant refuted the existence of any relationship in contract or tort with the respondent, and contended that it was merely an introducer to Qwinzy and not the financial adviser to manage the asset swap transaction for the respondent. The respondent in turn cross-appealed seeking that the quantum of damages awarded be revised to RM81,988,428.11, as being the actual amount of damages suffered by the respondent. The respondent further claimed a sum of RM294,100 for wasted time management, which had not been awarded by the trial judge. The two main issues that were raised in the appeal were whether the appellant owed the respondent a duty of care either in contract or tort and whether the appellant had breached that duty, if any.

Held:

(1) (per **Gopal Sri Ram JCA**) Having regard to the facts of this case it was not fair and reasonable that the appellant should owe a duty of care to the respondent. Having regard to the evidence and the totality of the circumstances of the present case the appellant was under no duty to take reasonable care in relation to the acts done by UIIF and Qwinzy after the sale and purchase agreement had been entered into. If UIIf or Qwinzy behaved reprehensibly towards the respondent that was something for which the appellant could not be made answerable in the tort of negligence. The trial judge erred in imposing a duty in tort on the appellant (see paras 6–7).

(2) (per **Raus Sharif JCA**) The trial judge was wrong to imply from the 'letter' that the appellant for a management fee would procure and manage an asset swap transaction with a third party. Such a finding was clearly contrary to the written words of the letter. The words used in the letter were in the past tense and could only mean that the appellant was seeking payment for a completed job ie the fee was paid by the respondent to the appellant upon the full release of the total sum by UIIF to the respondent. Moreover, the letter made no suggestion that it would cover future activities or obligations. When all these facts were pieced together they lead to the conclusion that the relationship between the appellant and the respondent was only up to the release of the funds and the role of the appellant was only as an introducer and not as a financial adviser to the respondent (see para 27).

(3) (per **Raus Sharif JCA**) When considering liability in tort, the question to consider is whether the test for negligent misstatement in *Hedley Byrne & Co Ltd v Heller & Partners* [1963] 2 All ER 576 ('*Hedley Byrne*') applies. It would not apply because this was a case where the respondent and UIIF entered into a financial arrangement governed by terms of contract whereby the respondent was required to service

monthly installments. It was a contract between the respondent and UIIF and the parties to this contract dealt directly with each other. Furthermore, in this case it was the respondent who wrongly spelt UIIF's name in the bank draft, which started the train of events that led to the termination of the contract between UIIF and the respondent. These were events totally unconnected with, and beyond the contemplation of the appellant's action. Thus, the inability of the respondent to exercise its option to buy back the shares and thereby having suffered a loss could not be attributed to the appellant. The question of the appellant being liable for negligent misstatement under the doctrine of *Hedley Byrne* did not arise (see paras 37–39 & 64).

(4) (per **Gopal Sri Ram JCA** and **Raus Sharif JCA**) It is a settled principle of appellate jurisprudence that the failure of a trial judge to sufficiently appreciate the evidence before him is a ground of intervention by a court of appeal even in case which turn on the credibility of a witness. In the present case, this principle was brought into sharp focus because of the way in which the High Court approached the evidence of the respondent's witness (the witness). Although the facts showed that the duty of the appellant could not be enlarged beyond the release of the funds, the trial judge decided otherwise based on the evidence of this witness, a self confessed perjurer and the author of the scam. This was a bought witness, in that he was a witness whose testimony had been obtained by the respondent in exchange for a number of things. Thus, there was no justification for the trial judge to elevate this witness, who had a purpose of his own with the respondent, to a credible witness. When faced with such evidence it was incumbent upon the trial court to carefully scrutinise the evidence and approach it with the utmost caution and suspicion. Failure to do so sufficiently or at all will constitute a misdirection warranting appellate intervention. The trial judge ought, in all the circumstances of this case, place no weight upon the evidence of this witness in so far as it related to the extent of the obligations that lay upon the appellant in contract. Thus, on the evidence recorded in this case, the ambit of the appellant's duty was only to the stage of the release of the funds and there was no implied contract between the appellant and the respondent to manage the asset swap transaction between the respondent and Qwinzy (see paras 2–3 & 33).

(5) (per **Zainun Ali JCA**) As evidence indicated, the appellant was not privy to the contract entered into between the respondent and UIIF. After the sale and purchase agreement, the respondent and UIIF dealt directly with each other. The draft was not prepared by nor was it shown to the appellant before sending it to UIIF. Neither was it delivered by the appellant to UIIF (see para 65).

(6) (per **Zainun Ali JCA**) The respondent had not proven that any assurances or representations were made and any information was disseminated that was false or misleading in a material particular by the appellant and that would have been likely to induce the respondent. In fact, from the evidence it would appear that if there was any inducement it was self-induced by the respondent. Based as it were, on the entire intercourse between the appellant and the respondent, it had not been proven that the appellant as 'adviser' had actual or inferential knowledge of the relevant factors. The trial judge made a finding of fact that there existed such knowledge on the part of the appellant and that the appellant made representations with such knowledge that they were likely to be relied upon, but his finding was against the weight of evidence. Moreover, although the respondent sought to rely on s 86 of the Securities Industry Act 1983, no fault could be attributed to the appellant when none of the critical ingredients had been met and proven (see paras 88–89 & 101–104).

[Bahasa Malaysia summary

Konsortium Enterprise (M) Sdn Bhd ('Konsortium'), sebuah syarikat yang bersekutu dengan Asset Investment Pte Ltd ('responden'), telah memohon kepada perayu untuk pinjaman yang berjumlah RM10j dalam bentuk kemudahan margin terhadap jaminan saham-sahamnya di dalam Metroplex Bhd, sebuah syarikat yang telah disenaraikan di Bursa Saham Kuala Lumpur. Walaupun perayu tidak dapat menawarkan kemudahan margin, perayu telah mereka cara alternatif mendapatkan kemudahan kewangan iaitu transaksi pertukaran aset. Transaksi ini telah dilakukan melalui broker pinjaman di Hong Kong yang dikenali sebagai Qwinzy Corporate Services Ltyd ('Qwinzy'). Transaksi pertukaran aset melibatkan penjualan saham Metroplex kepada pemberi pinjam/pembeli yang diperkenalkan oleh Qwinzy dengan opsyen kepada Konsortium untuk membeli semula saham tersebut dalam tempoh yang ditetapkan. Qwinzy oleh itu adalah broker pertukaran aset untuk prinsipal pihak ketiga yang identitinya tidak dikenali oleh perayu di peringkat awal. Untuk meneruskan opsyen pembelian semula terhadap pembeli/pemberi pinjam, yuran ansuran opsyen perlu dibayar secara bulanan oleh Konsortium bermula dari tarikh pembayaran penuh dana tersebut. Perayu mengenakan yuran pengurusan sebanyak 1% daripada nilai bersih pertukaran aset kerana bertindak sebagai 'introducer' dan mendapatkan pihak-pihak untuk bersama (Konsortium dan Qwinzy). Apabila kesemua pihak telah bersetuju, Konsortium terus memohon untuk kemudahan pertukaran asset dengan pertamanya memohon kepada Bank Negara Malaysia ('BNM') untuk kelulusan. Apabila permohonan Konsortium untuk kebenaran telah ditolak, responden, sebuah syarikat luar persisir yang beroperasi di Kuala Lumpur, telah digunakan untuk menggantikan

Konsortium dan menguruskan penolakan BNM. BNM meluluskan permohonan responden dalam cadangannya untuk memasuki transaksi pertukaran aset dengan Qwinzy. Setakat perkara tersebut apabila responden menggantikan Konsortium dalam transaksi dengan Qwinzy, perayu tidak sedar akan kewujudan responden. Walau bagaimanapun, hubungan di antara perayu, Qwinzy dan responden tidak bertahan lama. Ianya telah berubah terutama apabila Qwinzy telah memperkenalkan prinsipal pihak ketiganya untuk menyertai transaksi pertukaran aset. United Islamic Investments Foundation ('UIIF') adalah salah satu prinsipal yang diperkenalkan kepada responden. Kemudiannya, responden telah memasuki satu perjanjian jual beli, yang berkaitan dengan transaksi pertukaran aset secara terus dengan UIIF. Di bawah perjanjian jual beli tersebut, perayu telah bersetuju untuk menjual 23 juta saham Metroplex yang bernilai RM0.73 sesaham dan tertakluk kepada opsyen yang diberikan bagi pihak responden untuk pembelian semula saham-saham tertakluk kepada terma dan syarat yang termaktub di dalamnya. Responden, dalam mengekalkan opsyen untuk pembelian semula saham-saham kekal sah, terpaksa membayar UIIF ansuran opsyen bulanan sejumlah HK326,663.88 setiap bulan. Responden membayar ansuran opsyen bulanannya tetapi cek kelima yang dibayar oleh responden kepada UIIF terdapat kesilapan teknikal yang mana nama UIIF telah disalah eja oleh responden yang menyebabkan UIIF telah menolak cek tersebut. UIIF mengisytiharkan kemungkiran oleh responden yang mana telah mendakwa, membenarkannya untuk menamatkan perjanjian tersebut. Responden terus memulakan tindakan terhadap UIIF dan Qwinzy dan beberapa pihak lain di Hong Kong. Kemudiannya bermulalah tindakan ini terhadap perayu bagi kemungkiran terma tersirat di dalam kontrak untuk melaksanakan kewajipan berjaga-jaga yang munasabah dan kegagalan oleh perayu untuk melepaskan kewajipan berjaga-jaganya dalam tort secara munasabah, akan menyebabkan kecuaian. Adalah kes responden bahawa disebabkan kecuaian salah nyata yang diberikan oleh perayu kepada responden, kemudiannya telah menanggung kerugian yang besar yang berjumlah RM81,988,482.11.

Hakim bicara telah memutuskan bahawa perayu telah terhutang kewajipan berjaga-jaga kepada responden dalam kedua-dua kontrak dan tort serta defendan telah memungkiri kewajipannya tetapi telah memberi penghakiman untuk jumlah RM26,984,728.75 bersama-sama faedah dan kos. Menurut hakim bicara, walaupun tidak terdapat perjanjian bertulis jelas berkenaan hubungan kontraktual di antara pihak-pihak, hubungan tersebut boleh tersirat daripada 'surat-menyurat' di antara pihak-pihak. 'Surat-menyurat' yang telah dirujuk oleh hakim bicara adalah surat daripada perayu yeng memberitahu responden bahawa mereka telah memuktamadkan pertukaran aset dengan Qwinzy dan akan mengenakan 1% terhadap nilai bersih pertukaran aset sebagai yuran pengurusan. Oleh itu, hakim bicara telah memutuskan bahawa perayu telah mendapatkan dan menguruskan

transaksi pertukaran aset dengan pihak ketiga untuk yuran pengurusan. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu menyangkal kewujudan mana-mana hubungan dalam kontrak atau tort dengan responden dan menegaskan bahawa ia semata-mata 'introducer' kepada Qwinzy dan bukannya penasihat kewangan untuk menguruskan transaksi pertukaran aset untuk responden. Sebagai balasan, responden membuat rayuan balas memohon kuantum ganti rugi yang diawardkan agar disemak semula kepada RM81,988,428.11, sebagai jumlah sebenar ganti rugi yang ditanggung oleh responden. Responden selanjutnya menuntut sejumlah RM294,100 untuk masa pengurusan yang dibazirkan, yang mana tidak diawardkan oleh hakim bicara. Dua isu utama yang dibangkitkan dalam rayuan adalah, sama ada perayu mempunyai kewajipan berjaga-jaga terhadap responden sama ada dalam kontrak atau tort dan sama ada perayu telah memungkiri kewajipan tersebut, jika ada.

Diputuskan:

(1) (oleh **Gopal Sri Ram HMR**) Berdasarkan fakta kes ini adalah tidak adil dan munasabah bahawa perayu patut mempunyai kewajipan berjaga-jaga kepada responden. Mengambilkira keterangan dan keseluruhan keadaan kes ini perayu tidak berkewajipan untuk berjaga-jaga secara munasabah berkaitan dengan tindakan yang dilakukan oleh UIIF dan Qwinzy selepas perjanjian jual beli dimasuki. Jika UIIF atau Qwinzy berkelakuan yang tercela terhadap responden, ianya adalah sesuatu yang mana perayu tidak boleh dipertanggungjawab dalam kecuaian tort. Hakim bicara telah terkhilaf dalam mengenakan kewajipan dalam tort terhadap perayu (lihat perenggan 6–7).

(2) (oleh **Raus Sharif HMR**) Hakim bicara adalah salah untuk mentafsirkan daripada 'surat' tersebut bahawa perayu untuk yuran pengurusan perlu mendapatkan dan menguruskan transaksi pertukaran aset dengan pihak ketiga. Dapatan tersebut adalah jelas bertentangan dengan perkataan bertulis surat tersebut. Perkataan yang digunakan dalam surat adalah dalam kala lampau dan hanya boleh dimaksudkan bahawa perayu meminta pembayaran untuk kerja yang telah disiapkan iaitu yuran telah dibayar oleh responden kepada perayu selepas pembayaran penuh daripada jumlah keseluruhan oleh UIIF kepada responden. Selanjutnya, surat tersebut tidak menyatakan bahawa ia akan meliputi aktiviti atas kewajipan yang akan datang. Apabila kesemua fakta digabungkan bersama, ianya menjurus kepada kesimpulan bahawa hubungan di antara perayu dan responden hanya sehingga pelepasan dana dan peranan perayu hanyalah sebagai 'introducer' dan bukannya penasihat kewangan kepada responden (lihat perenggan 27).

(3) (oleh **Raus Sharif HMR**) Apabila mempertimbangkan liabiliti dalam tort, persoalan yang perlu dipertimbangkan adalah sama ada ujian untuk kecuaian kenyataan salah di dalam *Hedley Byrne & Co Ltd v Heller and Partners* [1963] 2 All ER 576 ('*Hedley Byrne*') adalah terpakai. Ianya tidak terpakai kerana ini adalah kes di mana responden dan UIIF memasuki pengurusan kewangan yang dikawal oleh terma-terma kontrak yang mana responden dikehendaki untuk melunaskan ansuran bulanan. Ini adalah kontrak di antara responden dan UIIF dan pihak-pihak terhadap kontrak tersebut yang mana dieja secara silap nama UIIF dalam draf bank, yang memulakan rantaian peristiwa yang menjurus kepada penamatan kontrak di antara UIIF dan responden. Ini adalah kejadian yang keseluruhannya tidak berkaitan dan melangkaui tindakan perayu. Oleh itu, ketidakmampuan responden untuk melaksanakan opsyennya untuk membeli semula saham-saham dan oleh itu menanggung kerugian tidak boleh dikatakan berpunca daripada perayu. Persoalan perayu berkenaan dengan kecuaian kenyataan salah di bawah doktrin *Hedley Byrne* tidak timbul (lihat perenggan 37–39 & 64).

(4) (oleh **Gopal Sri Ram HMR** dan **Raus Sharif HMR**) Ia adalah prinsip jurisprudens rayuan yang jelas bahawa kegagalan hakim bicara untuk menghargai keterangan secara cukup di hadapannya adalah alasan campur tangan oleh mahkamah rayuan walaupun dalam kes mengancam kredibiliti seseorang saksi. Dalam kes ini, prinsip ini diberi fokus yang lebih teliti kerana cara pendekatan keterangan oleh Mahkamah Tinggi terhadap saksi responden ('saksi'). Walaupun, fakta menunjukkan bahawa kewajipan perayu tidak boleh diluaskan melangkaui pembayaran dana, hakim bicara memutuskan sebaliknya berdasarkan kepada keterangan saksi ini, pengakuan sendiri oleh orang yang bersumpah bohong dan perancang satu komplot. Ini adalah saksi yang dibawa, yang mana beliau adalah saksi yang testimoninya telah diperolehi oleh responden dalam pertukaran beberapa perkara. Oleh itu, tidak terdapat justifikasi untuk hakim bicara mengangkat saksi ini, yang mempunyai tujuannya sendiri dengan responden, sebagai saksi yang boleh dipercayai. Apabila menghadapi keterangan sebegitu adalah satu kewajipan mahkamah yang membicarakannya untuk secara berhati-hati meneliti keterangan dan pendekatannya dengan lebih berhati-hati dan syak. Kegagalan melakukan dengan secukupnya atau yang akan menyebabkan salah arahan yang menyebabkan campur tangan mahkamah rayuan. Hakim bicara perlu di dalam kesemua keadaan dalam kes ini tidak meletakkan keberatan terhadap keterangan saksi ini selagi mana berkaitan dengan takat kewajipan yang diperuntukkan perayu dalam kontrak. Di atas keterangan yang direkodkan dalam kes ini, kewajipan perayu adalah hanya dalam lingkungan peringkat pembayaran dana dan tidak terdapat kontrak

tersirat di antara perayu dan responden untuk menguruskan transaksi pertukaran aset di antara responden dan Qwinzy (lihat perenggan 2–3 & 33).

(5) (oleh **Zainun Ali HMR**) Berdasarkan keterangan yang ditunjukkan, perayu bukanlah pihak kepada kontrak yang telah dimasuki antara responden dan UIIF. Selepas perjanjian jual beli, responden dan UIIF telah berurusan secara langsung antara satu sama lain. Draf tidak disediakan oleh atau ditunjukkan kepada perayu sebelum menghantarnya kepada UIIF. Begitu juga ianya tidak dihantar oleh perayu kepada UIIF (lihat perenggan 65).

(6) (oleh **Zainun Ali HMR**) Responden tidak membuktikan bahawa apa-apa jaminan atau representasi yang dibuat dan apa-apa maklumat yang disebarkan adalah salah atau mengelirukan dalam butiran penting oleh perayu dan berkemungkinan mendorong responden. Bahkan, berdasarkan keterangan ianya kelihatan bahawa jika terdapat apa-apa dorongan ia adalah didorong sendiri oleh responden. Berdasarkan keseluruhan perhubungan di antara perayu dan responden ianya tidak dibuktikan bahawa perayu adalah 'penasihat' yang mempunyai pengetahuan yang sebenar atau yang berdasarkan inferens terhadap faktor-faktor yang relevan tersebut. Hakim bicara telah membuat dapatan fakta bahawa wujud pengetahuan sedemikian pada pihak perayu dan bahawa perayu telah membuat representasi dengan bahawa besar kemungkinan ia akan dipercayai, tetapi dapatannya bertentangan dengan keterangan. Selanjutnya, walaupun responden memohon untuk bergantung atas s 86 Akta Industri Sekuriti 1983, tiada kesilapan boleh dianggap berpunca daripada perayu apabila tiada satupun daripada bahan kritikan telah dipenuhi dan dibuktikan (lihat perenggan 88–89 & 101–104).]

Notes

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2689–2705.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on implied term, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2637–2638.

Cases referred to

Donoghue v Stevenson [1932] AC 562 (refd)

James McNaughton Paper Group Ltd v Hicks Anderson & Co [1991] 2 QB 113 (refd)

Hedley Byrne & Co Ltd v Heller & Partners [1963] 2 All ER 575 (refd)

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)

A *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (refd)
Majlis Perbandaran Ampang Jaya v Stephen Phoa [2006] 2 MLJ 389 (refd)
Malaysian International Merchant Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia [2001] 1 MLJ 375 (refd)
B *Pan Atlantic Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 (refd)
Teo Ai Choo v Leong See Hain [1986] 2 MLJ 221 (refd)

Legislation referred to
Securities Industry Act 1983 s 86

C

Appeal from: Civil Suit No D8(D3)-22–543 of 1993 (High Court, Kuala Lumpur)

Loh Siew Cheang (Ranjit Singh, Kelvin Seet, Jason Chan and Peh Hong Yee with him) (Cheang & Ariff) for the appellants.
D *Bastian Vendargon (Philip Chai with him) (Philip Chai & Co) for the respondents.*

Gopal Sri Ram JCA:

E

[1] I have had the advantage of reading my learned brother Raus Sharif's judgment and am in agreement with the reasons advanced by him for allowing this appeal. I merely wish to express my own views on two aspects
F of this case. The first has to do with the appreciation of the evidence by the learned judge and the second with the existence of a duty of care in tort.

[2] Taking the first, it is a settled principle of appellate jurisprudence that the failure of a trial judge to sufficiently appreciate the evidence before him
G is a ground of intervention by a court of appeal even in cases which turn on the credibility of a witness. As Raja Azlan Shah FJ (as His Royal Highness then was) said in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (at p 121):

H
> In cases where the oral evidence of a witness may be tested by some objective fact of a highly persuasive nature, it is within the competence of a modern appellate court to override the trial court on questions of pure fact, even though this has been decided on the basis of credibility.

I

[3] In the present instance this principle is brought into sharp focus because of the way in which the High Court approached the evidence of PW4. As my learned brother has pointed out in his judgment, this was a 'bought witness',

that is to say, he was a witness whose testimony had been obtained by the respondent in exchange for a number of things. This, of course, apart from the fact that he was a self confessed liar. In other words, he was a witness who has no respect for the oath that he had taken. Now, when faced with the evidence of such a witness it is incumbent upon the trial court to carefully scrutinise it and to approach it with the utmost of caution and suspicion. Failure to do so sufficiently or at all will constitute a misdirection warranting appellate intervention. A reading of the learned judge's judgment in the present case reveals that he turned an indulgent eye upon the evidence of PW4 when it called for the strictest of scrutiny and deserved to be treated with the utmost of caution and suspicion. In my judgment, the learned trial judge ought in all the circumstances of the case placed no weight upon the evidence of PW4 in so far as it related to the extent of the obligations that lay upon the appellant in contract.

[4] I now turn to the second point: the duty of care in tort. In this regard I need go no further than to quote the following passage in the judgment of Steve Shim CJ (Sabah and Sarawak) in *Majlis Perbandaran Ampang Jaya v Stephen Phoa* [2006] 2 MLJ 389 (at p 405):

> Under the English law, the general duty of care test enunciated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test, three questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[5] I need only add that the same position obtains here. I would also point out that in a later passage the learned Chief Judge endorsed the view that 'caution should be exercised in extending the principle in *Donoghue v Stevenson* [1932] AC 562 to new situations'. He also recognised that: 'Much would depend on the facts and circumstances of each case in determining the existence or otherwise of a duty of care.'

[6] In my judgment, having regard to the facts of this case, it is not fair and reasonable that the appellant should owe a duty of care to the respondent. The facts of the present case that clearly exclude the imposition of a duty of care upon the appellant have been alluded to in the careful judgment of my learned brother and any further discussion of them will be a meaningless addition. All I need say is that having regard to the evidence and the totality of the circumstances of the present case the appellant was under no duty to take reasonable care in relation to the acts done by UIIF and Qwinzy after the sale and purchase agreement had been entered into. If UIIF or Qwinzy

behaved reprehensibly towards the respondent that is something for which the appellant cannot be made answerable in the tort of negligence.

[7] To summarise, firstly, the appellant did what it promised and was paid to do. In other words it fulfilled its obligation in contract. Second, on the proved facts it was under no enlarged duty in tort to take reasonable care that UIIF and/or Qwinzy would not act in an unlawful manner towards the respondent. It would be quite unfair and reasonable to impose such a duty upon the appellant. The learned judge did so. In my respectful view he erred in that respect.

Raus Sharif JCA:

[8] This is an appeal directed against the order of the High Court Kuala Lumpur entering judgment for the plaintiff for losses suffered following a share swap transaction in the sum of RM26,984,728.75 together with interest and costs.

[9] The factual background against which this appeal rests is as follows. Konsortium Enterprise (M) Sdn Bhd ('Konsortium'), a company associated with the plaintiff, approached the defendant, a company carrying on business as stock brokers, for a loan of RM10m in the form of a margin facility against the security of shares in Metroplex Bhd. Metroplex Bhd is company listed on the Kuala Lumpur stock exchange.

[10] A meeting was then held on 9 April 1992 between Mr Freddy Yap ('DW1'), and Steven Ho ('Steven'), on behalf on the defendant and Mr Andrew Goh ('PW1') and Mrs Lo Yin Fun ('YF Lo'), on behalf of Konsortium. At this meeting DW1 informed that the defendant was not able to offer the margin facility but it could arrange for a loan through a loan broker in Hong Kong, Qwinzy Corporate Services Limited ('Qwinzy') by way of an asset swap transaction. It would involve the sale of Metroplex shares to lenders/buyers to be introduced by Qwinzy with an option to Konsortium to repurchase the shares within a stated period. To keep alive the repurchase option against buyers/lenders, option installment fees are payable monthly by Konsortium commencing from the date of full release of the funds. For the arrangement, the appellant would charge a management fee of 1% of the net value of the asset swap.

[11] After the meeting, Konsortium proceeded to apply for the asset swap facility. PW1 filled the application form which was given by the defendant. The application form was signed by Mr Chan Teik Huat ('Chan'), the person who controlled Konsortium, and one other person. However, to proceed

further, an approval of Bank Negara Malaysia (BNM) was necessary. Hence, on 30 April 1992, Konsortium wrote to BNM for permission.

[12] On 15 May 1992, BNM rejected Konsortium's application for permission. To get around BNM's disapproval, the plaintiff, a Singapore company operating in Kuala Lumpur was then used to replace Konsortium. On 21 May 1992, the plaintiff submitted the application form for the asset swap facility to Qwinzy through the defendant. On 26 May 1992, Qwinzy wrote to the plaintiff informing that it had secured approval for the plaintiff's application. The letter was sent to the defendant which then forwarded it to the plaintiff.

[13] On 3 July 1992, a sale and purchase agreement in relation to the asset swap transaction was entered into between United Islamic Investments Foundation ('UIIF') and the plaintiff. Under the sale and purchase agreement, the plaintiff agreed to sell 23m Metroplex shares valued at RM0.73 per share and subject to an option granted in favour of the plaintiff to repurchase the shares upon the terms and conditions set out therein.

[14] Between 8 July 1992 to 1 October 1992, the Metroplex shares were duly delivered to UIIF or to Qwinzy on its behalf by or on behalf of the plaintiff in pursuant to its obligation under the sale and purchase agreement. In accordance with the terms thereof, a total sum of HK32,559,738.75 was paid to the plaintiff for the Metroplex shares by UIIF or Qwinzy on its behalf. Upon the full release of the total sum, management fee of 1% of the net value of the asset swap was thereafter paid to the defendant.

[15] The plaintiff, in order to keep the option to repurchase the shares valid is obliged to pay UIIF a monthly option instalment of HK326,663.88 for 36 months. The plaintiff made five monthly option instalments of HK326,663.88 each from November 1992 to March 1993. However in one of the monthly option instalments, the plaintiff had incorrectly spelt UIIF in a bank draft. Qwinzy then on behalf of UIIF, by a letter dated 14 January 1993 declared the option to repurchase the shares had become void under the sale and purchase agreement as the bank draft was unacceptable.

[16] On 27 April 1993, the plaintiff's solicitors gave separate notices to UIIF, Qwinzy and few others including the defendant that the plaintiff would be instituting legal proceedings against them respectively. On 24 May 1993 the plaintiff commenced action against UIIF, Qwinzy and several other parties in Hong Kong High Court ('Hong Kong's action'). On 27 May 1993, the plaintiff commenced the present action against the defendant at the High Court Kuala Lumpur.

[17] On 24 August 1995, the plaintiff entered into a consent judgment with respect of its claim against UIIF, Qwinzy and other parties in the Hong Kong's action. However, in Malaysia the plaintiff continued to pursue its action against the defendant. The claims against the defendant were on the following causes of action:

(a) breach of implied terms of contract by the defendant in carrying out a reasonable duty of care; and/or

(b) failure by the defendant to discharge its duty of care in tort to exercise reasonably duty of care in its dealings and relationship between plaintiff and defendant resulting in negligence.

[18] It is the plaintiff's case that as the result of the negligent, misrepresentations and assurances which were given by the defendant to the plaintiff, the plaintiff has suffered substantial losses calculated to the sum of RM81,988,482.

[19] The case was originally heard by Ariffin Jaka J (as he then was). He recorded all the evidence but recused himself before delivering judgment. The case was taken over by Abdul Wahab Said Ahmad J (trial judge) who recalled all the witnesses for clarification of the printed evidence taken by Ariffin Jaka J.

[20] On 17 December 2004, the learned trial judge held that the defendant owed a duty of care to the plaintiff both in contract and tort and the defendant had breached its duty. Accordingly, he gave judgment in favour of the plaintiff but only for the sum of RM26,984,728.75 together with interest and costs. Hence, this appeal by the defendant.

[21] The plaintiff in turn cross appealed seeking the quantum of damages awarded be revised to RM81,988,482.11, as being the amount of damages which naturally arose and was suffered by the plaintiff. In addition, the plaintiff was also claiming for a sum of RM294,100 for wasted management time, which was not awarded by the learned trial judge.

[22] A number of issues were raised in this appeal but the core issue really is whether the defendant owed the plaintiff a duty of care either in contract or tort and whether or not the defendant had breached its duty.

DUTY OF CARE UNDER CONTRACT

[23] It is the contention of the plaintiff that a contract exists between the plaintiff and the defendant to procure and manage the asset swap transaction with a third party for the plaintiff with the management fee as the

consideration. According to the plaintiff, the terms and evidence of such contract may be read from the exchange of correspondences between the plaintiff and the defendant relating to the procurement of the asset swap transaction. And although there is no express terms of the contract to that effect, it is contended that following well established principles, the court may imply a term into a contract to give it business efficacy.

[24] The defendant refuted the existence of any such contract with the plaintiff. To the defendant, its relationship with the plaintiff was merely as introducer to Qwinzy and not the financial adviser to manage the asset swap transaction for the plaintiff. Thus, its duty to the plaintiff was only up to the stage of release of the funds.

[25] The learned trial judge accepted the plaintiff's submission and ruled as follows:

> Plaintiff must prove that there existed a contractual relationship between the parties. In the absence of express terms in a written formal agreement, such a relationship can be gleaned from the intention of the parties. In this case, I find that the correspondence between the parties had sufficiently evinced this fact. The terms of the agreement as implied from the said correspondence stipulated that the defendant, for a management fee' would procure and manage an asset swap transaction with a third party.

[26] The 'correspondence between the parties' referred to by the learned judge, is the letter from the defendant dated 29 May 1992 ('the letter'). The letter, inter alia, stated:

> With reference to your letter dated 21 May 1992, we have finalised the arrangement of the above Asset Swap with Qwinzy Corporation Services Ltd. Enclosed herewith are their Letter of Offer dated 26 May 1992 for your attention.
>
> For the above arrangement we will be charging you 1% on the net value of the Asset Swap as Management Services rendered.

[27] It is my respectful view that the learned trial judge was wrong to imply from the letter that the defendant for a management fee would procure and manage an asset swap transaction with a third party. Such a finding is clearly contrary to the written words of the letter. The words used in the letter were in the past tense ie 'have finalised' and 'services rendered'. It can only mean that the defendant had completed their job and hence seeking for the fee for the job done. And it should be noted that the letter makes no suggestion that the fee will cover future activities or obligations. There was also no response from the plaintiff to dispute or clarify the letter and the hard fact is, the fee was paid by the plaintiff to the defendant upon the full release of the total

A sum by UIIF to the plaintiff. This fact points to the fact that the relationship between the plaintiff and defendant was only up to the release of the funds. The role of the defendant in their relationship with the plaintiff was a mere introducer and not as a financial adviser to the plaintiff.

B **[28]** My above view is further supported by the plaintiff's own witness who confirmed that the ambit of the relationship between the plaintiff and the defendant was up to the stage of releasing the funds. PW1 during cross-examination said:

C > I agree that OSK is under an obligation to plaintiff for the management service which would include resourcing and arranging the facility and also on the negotiation of the terms and up to the stage of releasing of funding.

In re-examination, PW1 re-confirmed the above where he said:

D > The 1% means management services which would include resourcing and arranging the facility and also on the negotiation of the terms and up to the stage of releasing of fund.

E **[29]** Clearly, from the above, that duty of the defendant cannot be enlarged beyond the release of the funds. But the learned trial judge decided otherwise. In doing so, he relied on the evidence of Amir Sharifuddin bin Johan (PW4). But PW4 is a self-confessed perjurer and the author of the scam. His testimony against the defendant in Malaysia was the result of a bargain made
F with the plaintiff in the Hong Kong's action. The bargain struck between the plaintiff and PW4 were as follows.

[30] PW4 to keep his residence in Hong Kong:

G (a) plaintiff to discontinue the Hong Kong's action against PW4's employee;

(b) PW4 to testify for the plaintiff against the defendant;

(c) a consent judgment entered only against five parties in the Hong Kong's
H action for the sum of HK$185,206 and plaintiff is not entitled to recover against the other ten defendants in the consent judgment, which include PW4's wife.

[31] It is my respectful view that the learned trial judge's reliance of PW4's
I evidence in enlarging the scope of defendant's duty was unjustified. It is crystal clear that PW4 is a self confessed liar and 'bought' witness. PW4 admitted in evidence that he was the author of the fraud. In his evidence in 1995, during cross examination, he admitted he had perjured in Hong Kong. In re-examination, he also said:

> I created a falsehood in my affirmation in the Hong Kong action in order to cover the lies in the brochures.

[32] Thus, there is no justification for the learned trial judge to elevate PW4, a bought witness, who had a purpose of his own in conjunction with the plaintiff, to a credible witness. Hence, PW4's evidence of enlarging the scope of the defendant's duty that of 'financial advisor' as opposed to an 'introducer' should have been disregarded by the trial judge. Clearly, there is no factual foundation for PW4's thinking that the defendant was the plaintiff's financial adviser. For the learned trial judge to accept PW4's thinking, and to ignore the other compelling evidence is a classic case of a finding which is very much against the weight of evidence. This court has a duty to interfere with such findings (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97).

[33] Thus, it is my respectful view that on the evidence recorded in this case, the ambit of the defendant's duty was only to the stage of release of the funds. Once the funds were released, the defendant owe the plaintiff no further duty. There is no implied contract between the plaintiff and the defendant to manage the asset swap transaction between the plaintiff and Qwinzy. The defendant was merely an introducer and not as a financial advisor to the plaintiff. The defendant owed the plaintiff no duty of care on the asset swap transaction between the plaintiff and UIIF. Thus, the question that the defendant had breached its duty of care under contract does not arise.

DUTY OF CARE IN TORT

[34] The learned trial judge found as a fact that the defendant had made oral representations that Qwinzy was financially strong and the persons running Qwinzy were honest, reliable and were of high integrity. According to him, the representations were made to the plaintiff through PW1. After making the said findings, the learned trial judge concluded:

> The defendant is expected to exercise reasonable skill, care and judgment in carrying out its duties for the plaintiff. It is their duty to ascertain the representation made by Qwinzy before assuring the plaintiff. The defendant should ascertain with reasonable certainty the accuracy of facts transmitted to the plaintiff. The defendant also must exercisable reasonable care and judgment when giving advice. These duties of care in law are as profound in *Hedley Byrne & Heller* and applied in *MIMB v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia*. The defendant themselves do not have competent knowledge of the mechanics of the asset swap. It is from this breach of duty that the defendant is liable for the loss incurred.

[35] With utmost respect, I have no hesitation in accepting the well established principle of law as profound by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners* [1963] 2 All ER 575 (*Hedley Byrne*) which was applied by this court in *Malaysian International Merchant Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 MLJ 375 (*MIMB*). The principle in *Hedley Byrne*, read as follows:

> If in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in the circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on and the person asked chooses to give the information or advice without so clearly qualifying his answer as to show that he does not accept responsibility then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results.

[36] The question now is whether the above principle is applicable to the facts of the present case. I do not think so. No doubt the principle in *Hedley Byrne* was applied in *MIMB* but it was decided on the facts. The facts in *MIMB* are these. Certain representations were made by the merchant bank to Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia ('LBPAPTIM') which induced then to invest in a company. The representations given (orally as well as from documents) were that the director of the company had guaranteed a dividend of 24% per annum and the company was a respectable company and a sound financial standing. Subsequently, it was discovered that the director's guarantee of 24% dividend per annum was in fact false. It also turned out the company was in fact of not a sound financial standing and subsequently went into receivership. Hence, rightly in that case, the merchant banker was held to be negligent and liable for the loss suffered by the LBPAPTIM.

[37] However, this not the situation in the present case. This case is not a case where the plaintiff made investments and lost money in a business or a project that failed. This case is a case where the plaintiff and UIIF entered into a financial arrangement governed by terms of contract whereby the plaintiff was required to service monthly option instalments. The terms were negotiated between Qwinzy, its lawyers in Singapore and the plaintiff's in-house legal team. It was a contract between the plaintiff and UIIF. The parties to the contract dealt directly with each other.

[38] In this case it was the plaintiff which did not spell UIIF in the bank draft correctly. This started the train of events. Qwinzy/UIIF took advantage of the plaintiff's mistake to declare that the option payment was not paid. These were events totally unconnected with, and beyond the contemplation

of the defendant's action. And it is not the plaintiff's case that the defendant was part of the decision-making process to reject the bank draft.

[39] It is my respectful view that the cause of the plaintiff's alleged loss had nothing to do with the financial soundness or otherwise of UIIF and Qwinzy. It bears no correlation to the ultimate cause of the plaintiff's loss. This is a case where PW4 wanted to get out of the deal as Metroplex Bhd shares arose substantially, thereby resulting in substantial potential loss to Qwinzy. The opportunity arose because of the technicality in respect of the bank draft. These actions, by no stretch of imagination can be regarded as connected to the defendant's purported action. The inability of the plaintiff to exercise its option to buy back the shares and thus suffered loss could not be attributed to the defendant. Thus, the question of the defendant being liable for negligent misstatement under the doctrine of *Hedley Byrne* does not arise. The defendant cannot be in breach of any duty in tort and thus cannot be liable for the loss suffered as alleged by the plaintiff.

[40] For the above reasons, the defendant's appeal is allowed. The plaintiff's cross appeal is dismissed. The costs in this court and the court below must be borne by the plaintiff. The deposit in court shall be refunded to the defendant.

Zainun Ali JCA:

[41] Having had the benefit of reading the judgment of my learned brothers, Gopal Sri Ram JCA and Raus Sharif JCA, I am in agreement with both of them in allowing this appeal.

[42] However I would like to add my own observation in this case. There are several areas of the law here which are worth further engagement. However, I shall do no more than focus on one aspect only. This relates to the non-appreciation of evidence by the learned judge (on a slightly different dimension than that taken by my learned brother, Gopal Sri Ram JCA).

[43] It concerns the failure of the learned judge to properly construe the purport and intent of s 86 of the Securities Industry Act 1983, as countenanced in the respondent's claim. This is connected to there being no judicial appreciation of the evidence with regard to his evaluation of both PW1's and DW1's testimony, pointing towards their credibility and evidential proof in the light of s 86 of the Securities Industry Act 1983.

[44] The respondent's action was based on implied terms of an oral contract and representation allegedly made by the appellant about a company

called Qwinzy at a meeting. Oral representation was also alleged to have been made about UIFF over the telephone in May 1992. The respondent's claims is that the representation formed the basis of a tort action on the *Hedley Byrne* principle.

[45] The court had to assess the evidence of two crucial, witnesses, ie PW1 and DW1.

[46] My view is the judge's finding that PW1 was the more credible of the two witnesses in the light of the evidence, showed that his assessment was obfuscated, for it went against the weight of evidence. This defect clearly calls for appellate intervention (see *Teo Ai Choo v Leong See Hain* [1986] 2 MLJ 221).

[47] A fortiori when a statutory duty of care falls to be considered under s 86 of the Securities Industry Act 1983.

BACKGROUND FACTS

[48] Even if the facts of this case have been carefully prepared by my learned brother Raus Sharif JCA, significant portions need be highlighted.

[49] Briefly it all begun when a company called Konsortium Enterprise (M) Sdn Bhd ('Konsortium'), controlled by one Dick Chan, applied to the appellant for margin financing.

[50] Appellant declined the request. However the appellant through its servants, one Freddy Yap ('Yap') and Steven Ho ('Ho') told one Andrew Goh ('Goh') from Konsortium, of an alternative means of obtaining finance ie an asset swap transaction. This is to be done through a loan broker in Hong Kong, known as Qwinzy Corporate Services Ltd ('Qwinzy'). Konsortium agreed to this proposal. Upon being contacted by the Appellant, Qwinzy said that this facility can be arranged.

[51] Basically an asset swap transaction is the business of the selling of shares to lenders/buyers, who has an option to buy back the shares. The condition for buy-back is for the seller to pay monthly option instalments upon full release of the fund, to keep the option alive.

[52] Thus what Qwinzy is offering is probably a kind a debt finance which brings into focus some legal principles not otherwise central to corporate or

company or even contract law. Qwinzy in fact, is an asset swap broker for third party principals whose identities were not known to the appellant (at least at the initial stage). A

[53] For its part in getting the parties together (Konsortium and Qwinzy) with the appellant as 'introducer', the appellant would charge a management fee of 1% of the value of the transaction. B

[54] Negotiations were had. Konsortium had to make the necessary application to the Central Bank (Bank Negara Malaysia) which, however, rejected Konsortium's application. C

[55] Though Konsortium wanted to withdraw from the said transaction, Goh asked Yap whether an alternative method of obtaining finance is available. Discussions between parties culminated in Dick Chan putting the respondent in place of Konsortium, to take over where Konsortium left off. Dick Chan had predicted that the respondent as an offshore company (Singapore) operating in Kuala Lumpur, might have a better chance of obtaining Bank Negara's approval in the asset swap transaction. D

[56] Dick Chan's calculated move paid off. Bank Negara duly approved the respondent's application in its proposal to enter into an asset swap transaction with Qwinzy. E

[57] For the record, it is significant that at least form 15 May 1992 up to 21 May 1992, the appellant did not know of nor was it aware of the existence of the respondent, until such time when Goh informed the appellant that the respondent will replace Konsortium in the transaction with Qwinzy. F

[58] On 21 May 1992 the respondent made an application to Qwinzy for the sale and purchase of Metroplex Bhd shares. G

[59] However the relationship of this *ménage a trois* (ie appellant, Qwinzy and respondent) did not last for very long. H

[60] A change came about when Qwinzy introduced its third party principals to participate in the asset swap transaction. Qwinzy introduced the United Islamic Investment Foundation ('UIIF') and Oxbridge Investment Ltd (Oxbridge) where either one of these principals would be a contracting party with the respondent. I

[61] After a flurry of negotiations, UIIF (not Qwinzy) became the contracting party with the respondent. For its part, the appellant was paid its fee.

A **[62]** Noting the sequence of events, it is shown that the respondent had placed their application to Qwinzy on the asset swap transaction (ie on 21 May 1992) prior to receiving the literature regarding Qwinzy and its third party principals. The respondent received these brochures only on 23 May 1992 from the appellant.

B

[63] A sale and purchase agreement was signed between the respondent and UIIF (with Qwinzy being the figure behind UIIF) on 3 July 1992.

C **[64]** The respondent paid its monthly 'option' instalments but the fifth cheque paid by the respondent to UIIF ran into some 'technical' difficulty. The name UIIF was apparently wrongly spelt by the respondent which led UIIF to reject the said cheque. UIIF declared a breach by the respondent which it said allowed it to terminate the agreement.

D

[65] As evidence indicated, the appellant was not privy to the contract entered into between the respondent and UIIF. After the sale and purchase agreement, parties (respondent and UIIF) dealt directly with each other. The draft was not prepared by nor was it shown to the appellant before sending
E it to UIIF, it was also not delivered by the appellant to UIIF.

[66] In fact it is PW1's evidence that DW1 was notified of the rejection of the draft only after 14 January 1993 so DW1 cannot be said to have knowledge implied or otherwise under s 86 Securities Industry Act.

F

[67] What is critical is to scrutinise the testimony of both PW1 and DW1, and testing them against the facts as they unfold.

G **[68]** It is a fact that a meeting was held on 9 April 1992 between Mr Yap and Steven Ho (for the appellant) and Mr Goh and Ms Lo (for Konsortium). Mr Goh alleged that Mr Yap represented, inter alia, that Qwinzy is reputable and, financially sound and that the appellant had successfully negotiated several transactions for public listed companies in Malaysia with Qwinzy.
H Mr Goh further alleged that Mr Yap subsequently, in May, had also assured him of the financial standing and integrity of Qwinzy, including that of UIIF.

[69] Mr Yap however, denied all of the above. Looking at the fact, what is discernible is that Mr Yap had sent the brochures relating to Qwinzy, UIIF
I and Oxbridge to Mr Goh on 23 May 1992.

[70] In denying the above, Mr Yap said that alternatively, if at all such representations were made, they were based on the literature regarding the same, which he sent on 23 May 1992.

[71] PW1's testimony as disclosed, both in examination and under cross-examination did not add up to the facts. A

[72] In cross-examination, PW1 said that DW1 made representation to him over the telephone about UIIF, before 21 May 1992. B

[73] But PW1's witness statement indicated otherwise; that the first time he knew about UIIF was on 25 May 1992 when DW1 delivered him the UIIF brochure. At para 23 PW1 said:

> … The first time I knew about the identities of the parties in the transaction was when we receive the brochure. C

[74] PW1 went on to confirm that the brochures on UIIF *did nothing to induce* the respondent into entering the sale and purchase agreement with UIIF on 3 July 1992. D

[75] PW1 went on to say that the UIIF brochure contained no financial representation that would induce the respondent entering the sale & purchase agreement with UIIF on 3 July 1992. E

[76] PW1 however testified that he persuaded Dick Chan to go on with the transaction 'since it is on the same terms and conditions as that of Konsortium' and that '… we rely on Yap's representations'. F

[77] But what exactly was Yap (DW1's) representations alleged to have been made during the meeting and what exactly did DW1 represent to PW1 about UIIF before 25 May 1992?

[78] As it is undisclosed what was DW1's assurances or representations (since Dick Chan was not called to testify) and there is nothing by way of financial assurance in the UIIF brochure either, one is hard pressed to see how 'knowledge' can be attributed to DW1, implied or otherwise, in view of s 86 of the Securities Industry Act 1983. G H

[79] Section 86 of the Securities Industry Act 1983 reads as follows:

> 86 A person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market price of securities if, when he makes the statement or disseminates the information. I
>
> (a) he does not care whether the statement or information is true or false; or

A (b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

[80] PW1 went on to say that he would not have proceeded with the application had it not been for the assurance and representation given him by Yap.

[81] PW1 made another gaffé. He said that 'at all times prior to the submission of the application, Yap never told me to undertake any investigations on the parties. Neither did Yap nor anyone from OSK ever said to me that it was my responsibility to conduct any inquiries on the identity of the parties'.

[82] In my view, it is reasonable for the appellant to expect that the respondent would not rely on its statement without obtaining independent legal advice. This is all the more critical since UIIF contained no financial statement.

[83] On the part of DW1 his evidence clearly showed the extent of the appellant's involvement. Though admitting there was a meeting between him, Goh and Lo, that meeting only concerned matters relating to interest rates, structure of asset swapping and appellant's introduction fee.

[84] At the same meeting, only the advertisement copies of the *Investors Digest* about the facility was passed on to the respondent. The appellant denied that prior to the signing of the agreement he had said that in his opinion Qwinzy was a reputable corporation.

[85] Though the appellant admitted saying that Qwinzy had concluded deals with the appellant where the appellant's job was to introduce parties to one another, it was just that. Nothing more, nothing less.

[86] Mr Yap went on to say that thereafter the parties dealt directly with each other.

[87] It is noted that if at all DW1 had made representations, these were made about Qwinzy and not UIFF. Qwinzy was not the contracting party, but UIIF.

[88] In so far as I am concerned, the respondent had not proven that no assurances or representation were proven to have been made and no information was disseminated that is false or misleading in a material particular, by the appellant, likely to induce the respondent.

[89] It can in fact be said, from the evidence that if at all there was any inducement, it was self-induced by the respondent's party. A

[90] Given that Yap's 'representations' were about Qwinzy (and not UIIF), if at all, and that particulars of UIIF featured only after 21 May 1992 when brochures were sent (so there was no clear statement or information which is false or misleading in a material particular by the appellant) there is also nothing in the avowed financial objections of UIIF which could have induced the respondent, the testimony of PW1 was certainly less than credible. B

[91] In any case what could have been the 'inducement' capable of galvanizing the respondent into action in entering into the agreement in this case? C

[92] If it is the 'lower interest and higher margin' aspect of the facility which he himself said was an important factor for him to consider, the respondent's position was clearly self-serving. D

[93] This is a case of self-inducement where even if there was reliance, it was unreliable reliance. E

[94] In fact, in cross-examination, PW1 said:

> The inducement to the plaintiff (respondent) was the strong financial standing with US10 billion paid up. At the time I read this, my impression is that the foundation was in the process of being organized. I was also impressed by the brochure of the Board of Governors being known Muslim scholars … F

[95] Clearly on the respondent's part, the inducement was self-imposed. G

[96] Reading the brochure the way he did was unreliable reliance. As observed in *James McNaughton Paper Group Ltd v Hicks Anderson & Co Ltd* [1991] 2 QB 113:

> One should therefore consider whether and to what extent the advisee was entitled to rely on the statement to take the action that he did take. It is also necessary to consider whether he did in fact rely on the statement, whether he did use or should have used his own judgment and whether he did seek or should have sought independent advice. In business transactions conducted at arm's length it may sometimes be difficult for an advisee to prove that he was entitled to act on a statement without taking any independent advice or to prove that the advisor knew, actually or inferentially, that he would act without taking such advice. H I

A **[97]** Since inducement has always been a requirement for misrepresentation, at least in the general law of contract, would the assurance given by DW1 on Qwinzy and the brochure sent after 21 May 1992 about UIIF have a positive effect in influencing the respondent?

B **[98]** Would the assurances about Qwinzy and brochures on UIIF be only within the knowledge of the appellant, or one that would lead the respondent to believe in it completely, inducing him to underestimate the risk, as if it does not exist? Was there any influence shown, by the appellant?

C **[99]** In this context, it can be said that 'influence' in its ordinary meaning is to affect or alter. Lord Lloyd for the minority in *Pan Atlantic Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 said that in the commercial sense, it is often used to mean 'assessment' as in the term 'market assessment'.

D **[100]** To my mind, if I were to properly understand the reasoning of Lord Lloyd (although this is an insurance case and his is a minority judgment) nothing can be properly described as 'influencing' anything unless it does actually have a positive effect on behavior.

E **[101]** Based as it were, on the entire intercourse between the appellant and the respondent, I fail to see how it is proven that an appellant as 'adviser' had actual or inferential knowledge of the relevant factors'.

F **[102]** Though the judge made a finding of fact that there exist such knowledge on the part of the appellant and that the representations he made was the knowledge that they are likely to be relied on for that purpose (see *McNaughton Ltd v Hicks Anderson & Co* [1991] 2 QB 113 his finding G was against the weight of evidence as manifested by the testimony of both PW1 and DW1 where he chose to rely heavily on the evidence of PW1.

[103] Even if it transpired at a subsequent date that the statement or information was false or misleading when PW4 himself admitted them to be H so, it was not reasonably foreseeable for the appellant to have known this fact.

[104] Since reliance was placed on s 86 of the Securities Industry Act 1983 by the respondent no fault can be attributed to the appellant when none of I the critical ingredients have been met and proven.

[105] In view of the above and findings of credibility of the trial judge I believe appellate intervention is in order.

Appeal allowed.

Reported by K Nesan